92-1156

NO.
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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992
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GEORGE HURST, RON MAYS,
HENRY JACKSON, JOHN MOORE, CHESTER DAVIS,
Petitioners

vs.

MARILYNN WILSON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether under the doctrine of qualified immunity, the law in 1986 was clearly established that a police officer's internal reports of sexual harassment are protected by the First Amendment.

2. Whether a police officer's internal report of sexual harassment is, without more, subject to the protections of the First Amendment.

PARTIES TO THE PROCEEDING

1. George Hurst, Ron Mays, Henry Jackson, John Moore, Chester Davis, Petitioners.

2. The University of Texas Health Center at Tyler was a Defendant below for purposes of Respondent Wilson's Title VII claim, which was dismissed.

3. Marilynn Wilson, Respondent

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NO.

* * * * * * * * * * *

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1992

* * * * * * * * *

GEORGE HURST, RON MAYS,
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ON PETITION FOR WRIT OF CERTIORARI
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PETITION FOR WRIT OF CERTIORARI

COME NOW, George Hurst, et al., and submit this Petition for Writ of Certiorari requesting that the Supreme Court grant a Writ of Certiorari, uphold the District Court, and reverse the Fifth Circuit.

PROCEEDINGS BELOW

The District Court granted Defendants' Motion for Directed Verdict on all jury issues in open court at the conclusion of Plaintiff's presentation of her case in chief. The District Court signed its final judgment in an order dated June 27, 1991, which is not reported. (See Appendix A.)

The Fifth Circuit affirmed in part and denied in part the judgment of the District Court in an opinion dated October 6, 1992, which is reported at 973 F.2d 1263 (5th Cir. 1992). (See Appendix B.)

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment I:

"Congress shall make no law...abridging the freedom of speech...."

STATEMENT OF THE CASE

Sergeant Marilynn Wilson was a campus security officer at the University of Texas Health Center at Tyler. In August of 1986, she reported having been sexually harassed by Chester Davis, one of her subordinates. The harassment had occurred in Davis' police car one month prior to the report. At the time of the incident, Wilson was restricted to light duty because of a shoulder injury. The incident was reported verbally to John Moore, Chief of the campus police department.

Chief Moore immediately ordered Wilson to write up the incident. Wilson's report contained not only the incident regarding herself, but also reports of harassment by Davis of other women. Davis denied harassing Wilson, but admitted making remarks to Jill Jones, another woman on campus. Davis had never been told by Jones that the remarks were unwelcome. Wilson then pressured Jones, who wrote a letter stating that the remarks made by Davis upset her. (After Wilson's eventual termination, Jones recanted the statements in this letter.) Davis was disciplined, receiving a three day suspension without pay.

Wilson then began reporting harassment by other police officers of other women on campus. Chief Moore ordered her to investigate. Wilson reported that one of the officers, Bill Glover, had asked a woman out, and that the woman did not welcome Glover's attention. Glover was

reprimanded. This time, the woman in question went to Chief Moore and told him that she liked Glover, that Glover had said nothing to upset her, and that Wilson's report of the incident was absolutely false. This woman, Nancy Simms, also told Moore that Wilson had interviewed her, Simms, about the incident and had reported the opposite of what Simms had said to Wilson. Other women whose statements were included in the report also told Moore that they had not been harassed and that Wilson had made false reports about incidents of harassment.

Wilson was demoted and given a ten day suspension for filing a false police report. During an appeal of her demotion and suspension, Wilson presented a document to Ron Mays, the hearing officer, which was purported to be an official University document. Mays took the document to Moore, who realized that it was not a copy, but a document made up to look like the original. Having demonstrated a pattern of falsehood, Wilson was terminated for presenting a forged document during a University appeal.

Wilson sued, claiming violations of Title VII, due process, First Amendment retaliation, and libel and slander regarding the accusation of forgery. The case was tried before the Honorable Howell Cobb, District Judge for the Eastern District of Texas. The District Court directed a verdict on all claims except Title VII, then issued a judgment on the Title VII claim for Defendants.

Regarding Plaintiff's First Amendment claim, Cobb directed a verdict for Defendants because the reports of sexual harassment were not made on issues of public concern.

The Fifth Circuit reversed and ordered a new trial on the First Amendment claim. The appeals court stated that reports of sexual harassment are of great public concern. That court also, without giving any reason or analysis, concludes that the individual Defendants have no qualified immunity. Petitioners seek review from this Court in order to reverse the Fifth Circuit's decisions regarding qualified immunity and the First Amendment.

ARGUMENT FOR GRANTING WRIT OF CERTIORARI

The decision of the Fifth Circuit conflicts on both questions presented for review with decisions of other United States Courts of Appeal. The Fifth Circuit has determined that qualified immunity does not apply to reports of sexual harassment because those reports are of prominent public concern. In reaching this conclusion, the Fifth Circuit has given no analysis or guidance for future cases. This conclusion is in stark contrast to the decision of the Tenth Circuit in *Wulf v. City of Wichita*, 883 F.2d 842 (10th Cir. 1989) wherein that court of appeals delineates guidelines for determining whether qualified immunity applied in a specific case.

Likewise, the Fifth Circuit's conclusion that a report of sexual harassment is protected speech conflicts with the Seventh Circuit's opinion in *Callaway v. Haferman*, 832 F.2d 414 (7th Cir. 1987) which found that a report of sexual harassment was not protected under the First Amendment.

RESTATEMENT OF QUESTION ONE PRESENTED FOR REVIEW

> Whether the caselaw in 1986 clearly established that an employer's internal report of sexual harassment was protected speech; i.e. whether it was clearly established that the form, context, and content of a police officer's internal report of sexual harassment to the immediate supervisor was made by a private citizen speaking on a matter of public concern.

This court has previously determined that governmental officials are shielded in their individual capacities from liability for constitutional violations unless the violation is of a right which is clearly established at the time it is alleged to have occurred. *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). However, this court has not given to the lower courts specific guidance on

how the doctrine of qualified immunity is to be applied to First Amendment claims. The lack of a pronouncement from this court has lead to a split between the lower courts in the analysis and application of the qualified immunity doctrine.[1]

As the Tenth Circuit pointed out in *Wulf v. City of Wichita*, the determination of whether a law was clearly established can be particularly difficult in the context of First Amendment claims because the question of whether particular speech is protected by the First Amendment is decided by the courts on a case-by-case basis. *Wulf v. City of Wichita* at 864, *citing Harlow v. Fitzgerald* at 154, 103 S.Ct. at 1694. The Tenth Circuit requires that the qualified immunity issue must be adequately related to the specific facts of a particular case. *Wulf v. City of Wichita* at 865, n.33. The *Wulf* court enters into an in-depth analysis of the relevant caselaw in determining the issue of qualified immunity.

In stark contrast to the Tenth Circuit in *Wulf*, the Fifth Circuit in this case merely concludes that a report of sexual harassment is of such prominent public concern that its First Amendment protection is clearly established. In fact, the Fifth Circuit implies that a report of sexual harassment is *per se* protected speech, and that the fact of its protection by the First Amendment is clearly established in the caselaw.

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[1] Petitioners are aware of this court's opinions in *Anderson v. Creighton*, 483 U.S. 635, 107 S.Ct. 3034 (1987) and in *Siegert v. Gilley*, ___ U.S. ___, 111 S.Ct. 1789 (1991). In *Anderson*, this court explained that the "contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right," but that it is not necessary that the specific action in question has been held to be unlawful. *Anderson* at 640, 107 S.Ct. at 3039. While this statement is helpful, it does not explicitly require the courts to identify the right in law existing at the time of the alleged violation, nor does it address the situation present in this case where a conflict regarding First Amendment law exists. In *Siegert*, this court gave guidance as to when the issue of qualified immunity must be decided, but again, gave no specific pronouncement as to the method of its application. *Siegert v. Gilley* at ____, 111 S.Ct. at 1793.

Such is simply not the case. As shown below, the Seventh Circuit has determined that a report of sexual harassment may not be protected under the First Amendment. (See *Callaway v. Hafeman*, 883 F.2d 842 (7th Cir. 1989).) In such a case as this, where a report of sexual harassment is found to be protected speech by one circuit court and not protected speech by another, the issue of qualified immunity should not be decided without any analysis, as the Fifth Circuit has done here.

This conflict among the circuits points up the central irony of the qualified immunity issue in this case. That irony is that two separate panels from different circuits might reach different conclusions regarding whether a report of sexual harassment is protected speech, and yet these Defendants, who are lay persons in the law, are charged with knowing that a report of sexual harassment is so clearly established to be protected speech that they may be held liable. The same irony may be seen in the fact that the district court, under the relevant caselaw, felt that this Plaintiff's speech was so clearly not protected that these Defendants deserved a verdict directed in their favor. Thus, the four federal judges who have looked specifically at Plaintiff's circumstance, have reached the opposite conclusion regarding the protected nature of her speech. However, even where federal judges cannot agree on the current state of First Amendment law, these Defendants are held responsible for knowing what that law is. The fact alone should establish the application of the doctrine of qualified immunity in this situation.

Indeed, where interpretations of the law are in such direct conflict, the doctrine of qualified immunity should apply. In applying the doctrine of qualified immunity, the courts should, at the very least, be required to determine whether a conflict exists. In those cases where federal judges reach differing conclusions, governmental officials should not be held to stand trial and face possible liability because they are imputed with knowledge of a rule of law on which the interpreters of that law disagree. While the existence of a conflict may not be the only rule of analysis in determining qualified immunity, the presence of such a conflict should

dispose of those cases where it exists in favor of the defendants.

Further, in instances where a defendant can point to caselaw which expressly supports the position that speech is not protected, qualified immunity should likewise apply. Here, Defendants cited Fifth Circuit precedent which provided that the question in First Amendment cases focuses on whether a plaintiff spoke in his role as a citizen or as an employee. The topic of the speech and its interest to the public is of "little moment." *Terrell v. University of Texas System Police*, 792 F.2d 1360, 1362 (5th Cir. 1986) *cert. denied*,479 U.S. 1064, 107 S.Ct. 948 (1987). As with Wilson, Terrell's speech consisted of an internal report. In this instance, the Fifth Circuit disregarded its own prior guidance and found Plaintiff's reports to be protected because they addressed a topic of great public concern.

This court should review this case in order to give guidance to the lower court in applying the doctrine of qualified immunity, to harmonize the law among the circuits, and to preserve the purpose of the doctrine itself, which is to weed out Constitutional claims which are not viable and to protect government servants from personal liability lawsuits that implicate rights which have yet to be established.

RESTATEMENT OF QUESTION TWO PRESENTED FOR REVIEW

WHETHER A REPORT OF SEXUAL HARASSMENT IS *PER SE* PROTECTED BY THE FIRST AMENDMENT

The Fifth Circuit has determined in this case that where an employee speaks both as an employee and as a citizen on a matter of public concern, that speech is protected under the First Amendment. The Fifth Circuit also determined that speech regarding sexual harassment is of public concern. The Seventh Circuit has reached the opposite conclusion.

In *Callaway v. Hafeman*, an affirmative action officer for the Madison, Wisconsin School District complained of sexual harassment by her supervisor. In evaluating whether Callaway's complaints were protected under the First Amendment, the Seventh Circuit noted that *Connick v. Myers* requires that the court examine the *point* of the speech: specifically, whether the employee's point was to bring a wrongdoing to light, to raise public concern issues, or to further a private interest. *Callaway v. Hafeman* at 417, *citing Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684 (1983). Reviewing the internal nature of Callaway's complaints, the Seventh Circuit determined that she was speaking as an employee attempting to resolve a personal problem. *Id.* Thus, Callaway's reports of sexual harassment were not protected. Although on first glance it is tempting to conclude that a report of sexual harassment is protected speech, the additional analysis utilized by the Seventh Circuit is needed. Indeed, the *Callaway* court acknowledges that reports of sexual harassment are of great public concern, but that the motivation of the speaker must be analyzed. *Id.*

This focus on the motivation of the speaker has previously been acknowledged and utilized in the Fifth Circuit. Prior Fifth Circuit law provided that a plaintiff's speech must have been made primarily as a citizen and not as an employee. *Thompson v. City of Starkville*, 901 F.2d 456, 461 (5th Cir. 1990). The Fifth Circuit also provided in prior law that a court assess the primary motivation behind speech in evaluating whether it addresses a matter of public concern. *Dodds v. Childers*, 933 F.2d 271, 273 (5th Cir. 1991). This prior focus on motivation is in line with the Seventh Circuit opinion in *Callaway*, and is in line with this court's decision in *Connick v. Myers*, on which *Callaway* was based.[2] The

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[2]The *Callaway* court relied on this court's examination in *Connick* of whether the plaintiff's speech was in connection with her personal interest or whether the speech was made to further controversy with her supervisors. *Callaway v. Hafeman* at 416, *citing Connick v. Myers* (citation omitted in original).

Fifth Circuit's new pronouncement in this case departs from an examination of a public employee's motivation in determining whether speech is of public concern and, in doing so, disregards its own prior caselaw and the pronouncement of this court in *Connick*.

REQUEST FOR RELIEF

This court should grant certiorari in this case in order to review the Fifth Circuit's decisions regarding qualified immunity and the First Amendment. After review, Petitioners request that the court reverse the Fifth Circuit's decision and uphold the district court's grant of directed verdict.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

MARILYNN WILSON	§	
Plaintiff	§	
	§	**CIVIL ACTION NO.**
VS.	§	**1:91CV249**
	§	
UNIVERSITY OF TEXAS	§	
HEALTH CENTER AT	§	
TYLER, ET AL.	§	
Defendants	§	

FINAL JUDGMENT

Plaintiff Marilynn Wilson brought this civil rights action against the University of Texas Health Science Center at Tyler, George A. Hurst, John Moore, Ron Mays, Henry P. Jackson, and Chester Davis, pursuant to the First, Fifth, and Fourteenth Amendments of the Constitution of the United States, and pursuant to 42 U.S.C. §1983, 1985, and 1988, and Title VII, 42 U.S.C. §2000 *et seq.*, along with a state law claim of defamation.

On March 25, 1991, this action went on for trial before the Court and a jury, and the issues having duly been tried, it is

ORDERED, AND ADJUDGED that the Court having heard Defendants' Motion for Directed Verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, has granted the Motion as to Defendants Hurst, Moore, Mays, Jackson, and Davis, and has dismissed all of Plaintiff's claims under the U.S. Constitution, under 42 U.S.C. §1983, 1985 and 1988, and under state law.

It is further ORDERED, ADJUDGED, AND DECREED that, in accordance with the Court's ruling on Defendants' directed verdict and in accordance with the Findings of Fact and Conclusions of Law entered by this

Court on June 7, 1991, that Judgment be entered for Defendants, that Plaintiff take nothing, and that all claims be dismissed with prejudice. Plaintiff will bear costs.

SIGNED this 27th day of June, 1991.

/s/
HOWELL COBB
United States District Judge

APPENDIX B

Marilynn WILSON, Plaintiff-Appellant,
v.
U.T. HEALTH CENTER, UT System Police Department, Etc., et al., Defendants-Appellees.

No. 91-4618
Summary Calendar.

United States Court of Appeals
Fifth Circuit.

October 6, 1992.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION.

Before REAVLEY, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

REAVLEY, Circuit Judge:

Marilynn Wilson contends that officials of the University of Texas Health Center (UTHC) demoted and discharged her from her position as a sergeant in retaliation for her reports of sexual harassment within the UTHC police force. At the close of Wilson's case-in-chief, the district court granted all defendants a directed verdict on Wilson's First Amendment and due process claims under 42 U.S.C. § 1983 and on her defamation claim under Texas law. After considering both sides' evidence, the district court entered judgment against Wilson on her claim under 42 U.S.C. § 2000e *et seq.* (Title VII) 773 F.Supp. 958. We affirm in part and reverse in part to allow a jury to consider Wilson's First Amendment and defamation claims against some defendants.

I. BACKGROUND

The events that occasioned this controversy occurred on UTHC's Tyler, Texas campus between August 1986 and March 1987. During that time, uncontroverted evidence establishes that UTHC police officers commonly used sexually suggestive language in communicating with one another. Wilson claims that UTHC officials disciplined her for reporting various incidents of sexual harassment. The officials claim that they disciplined Wilson because she made several misrepresentations in reporting those incidents to her immediate supervisor, police chief and defendant John Moore, and in appealing from disciplinary action that Moore took against her.

Wilson's troubles began in August 1986 when she brought a camera lens to the UTHC campus so that her co-worker and subordinate, defendant Chester Davis, could evaluate it.[1] Wilson claims that, instead of going to a hilltop to view the lens, Davis took her to a secluded place, grabbed her and kissed her on the neck despite her protestations and said that he would have his way with her. Davis denies any such contact or statement.

Almost one month later, Wilson reported the incident to UTHC's Acting Director of Personnel, Sharon Briery, who advised that she see Chief Moore. According to Moore's instructions, Wilson prepared a written report of the incident and also detailed incidents of Davis's verbal sexual misconduct toward three other UTHC employees. Davis admitted harassing one of these employees and Moore suspended him three days without pay for making sexually suggestive comments to women.[2] Moore also issued a letter of reprimand to Wilson for waiting so long to report Davis'

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[1] Davis and Wilson had some disagreements in 1984, but there was evidence that by August 1986 they appeared to be friends. For example, they bowled on a team together.

[2] Davis has also acknowledged such antics as giving black panties to a married woman, but the record does not show that he was reprimanded for any of these other sexually suggestive incidents.

conduct, stating:

> You, as a supervisor and an officer, have a duty to speak out. You cannot unclothe yourself of duty at your convenience. In this matter, you undressed yourself of responsibility both mentally and administratively by alleging intimidation and by waiting twenty-eight days before taking any action and/or reporting the incident to me.

Meanwhile, on October 30, 1986, Wilson went to Moore and said that she had hearsay evidence that Officer Bill Glover had been harassing two other UTHC employees, including Nancy Simms. Moore asked Wilson to investigate further, and he testified that he immediately reprimanded Glover. Wilson submitted a letter to Moore concerning Glover's requests that Simms spend time with him outside work and Glover's expenditure of inordinate amounts of time at Simms' place of work. Glover admitted asking Simms out for coffee, but denied many aspects of Wilson's report, including that he flirted with Simms. At a subsequent meeting with Moore and Wilson, and later at trial, Simms agreed with Glover's version of events and identified several exaggerations in Wilson's report.

On February 5, 1987, Moore issued Wilson a letter of reprimand, suspended her for ten days without pay, and reduced her in rank from sergeant to police officer. In his letter, Moore cites several incidents beginning in 1984 and concluding with the Glover incident in which he understands Wilson to have lied and maliciously maligned her fellow officers. Wilson indicated that she had read and understood Moore's letter by signing it, and then she signed a Personnel Disciplinary Report (PDR) form that Moore prepared concerning the matter for submission to the University System Police in Austin, Texas.

The PDR that Wilson signed for Moore (Moore's PDR) references attached documentation. Wilson asked to see the attachments and to have a copy of the PDR. Moore refused, but he allowed Wilson to copy the sparse information from the PDR by hand. She then paraphrased this information on a new PDR form (Wilson's PDR).

Wilson gave Wilson's PDR to her attorney. At a subsequent hearing that constituted part of Wilson's appeal of her demotion, Wilson's attorney demanded the attached documentation from Moore's supervisor, defendant Ron Mays. Wilson's attorney presented Mays with Wilson's PDR without stating that it was not an exact duplicate of Moore's PDR.

Mays took Wilson's PDR to Moore and asked for the attached documentation that it referenced. Moore did not recognize Wilson's PDR as the one he prepared. He and Mays compared the PDRs and discovered that they did not match. Two days later, on March 5, 1987, Moore presented Wilson with a letter of termination, citing Wilson's continued misrepresentations in the PDR incident as the reason for her discharge.

Wilson appealed her termination through UTHC channels and ultimately sued Davis, Moore, Mays, Henry Jackson (UTHC's Director of Equal Employment Opportunity), and George Hurst (UTHC's Director), among others, for, *inter alia*, depriving her of constitutional rights to free speech and due process, defamation, and retaliatory discharge in contravention of Title VII.

After Wilson's case-in-chief[3], the district court directed a verdict against Wilson 1) on her First Amendment claim after holding that Wilson's speech regarded a matter of insufficient public concern to merit protection, 2) on her due process claim after holding that Wilson received constitutionally sufficient process, and 3) on her defamation claim after holding that Wilson produced insufficient evidence of malice on the defendants' part. The court then continued the trial to resolve Wilson's Title VII retaliatory discharge claim and entered judgment against Wilson after hearing the evidence. The court found that Wilson made misrepresentation in her report about Glover and that Moore demoted her because of those misrepresentations, and then

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[3] The district court heard the testimony of Moore, Wilson, Jackson, and Davis.

terminated her because she misrepresented the authenticity of the PDR that her attorney handed to Mays.

II. DISCUSSION

A. Title VII

[1] Wilson tried her Title VII claim to the court as required by statute before Congress permitted jury trials of these cases in the Civil Rights Act of 1991. Our precedent precludes us from heeding Wilson's suggestion that we accord retroactive effect to the jury trial provisions of the Civil Rights Act of 1991. *Landgraf v. USI Film Products*, 968 F.2d 427, 432-33 (5th Cir.1992).

[2] Wilson argues that the district court applied the wrong legal standard in deciding that she was not discharged in retaliation for reporting sexual harassment as prohibited by 42 U.S.C. § 2000e-3(a). First, she claims that the court ignored the distinction between the truth of her charges and her belief in the truth of her charges. *See De Anda v. St. Joseph Hosp.*, 671 F.2d 850, 853 n. 2 (5th Cir.1982) ("reasonable belief" that employer engages in discriminatory practices sufficient to invoke Title VII protection); *Berg v. La Crosse Cooler Col*, 612 F.2d 1041, 1045-46 (7th Cir.1980) (employee who makes good faith, reasonable charges that employer's practice violates Title VII is protected from retaliatory discharge though charges unfounded.) But the court found the opposite of good faith on Wilson's part; it found that she knowingly made several misrepresentations to Moore, which caused her demotion and termination.

The court's findings also destroy Wilson's contention that she is entitled to recover under Title VII even if the defendants discharged her for both legitimate *and* illegitimate reasons. *See Price Waterhouse v. Hopkins*, 490 U.S.228, 241, 109 S.Ct. 1775, 1785, 104 L.Ed.2d 268 (1989) ("Title VII meant to condemn even those decisions based on a mixture of legitimate and illegitimate considerations"). The court concluded that Wilson did not prove that her reports of sexual harassment caused her termination and that her misrepresentations did.

[3] Wilson next argues that the fact findings on

which the court based its Title VII judgment are clearly erroneous. Our review of the record convinces us that ample evidence supports both Wilson's and the defendants' opposite positions concerning the reasons for the disciplinary action taken against Wilson. We are bound in such cases to defer to the credibility determinations of the trier of fact.

[4] Finally, Wilson argues that *Pettway v. American Cast Iron Pipe Co.*, 411 F.2d 998 (5th Cir. 1969), requires a different standard than that applied by the district court to decide whether the defendants disciplined her for legitimate or illegitimate reasons. She claims that *Pettway* interprets Title VII to prevent an employer from making a disciplinary decision based on its evaluation of the veracity of an employee's allegations that concern an activity that Title VII protects, such as complaints about sexual harassment. No court has read *Pettway* so broadly, and we see no justification for doing so now.

Pettway concerns a letter written by Peter Wrenn to the chairman of the Equal Employment Opportunity Commission (EEOC) in which Wrenn complained of his employer's discriminatory practices. Wrenn's employer got a copy of the letter and discharged him for making misrepresentations in the letter. This court held that "where, disregarding the malicious material contained in a charge (or...other communication with EEOC sufficient for EEOC proposes, or in a proceeding before EEOC) the charge otherwise satisfies the liberal requirements of a charge, the charging party is exercising a protected right under [Title VII]." *Id.* at 1007. The *Pettway* court understood that if it did not protect employee statements in EEOC proceedings, the EEOC's ability to administer Title VII would be impaired. *Id.* at 1005. Applying its understanding of the law, the *Pettway* court found that Wrenn's submission of the letter to the EEOC was protected by Title VII and his employer violated that statue by discharging him for making misrepresentations in the letter, even if a court later agreed with the employer that Wrenn's statements were misrepresentations. *Id.* at 1007-08.

Pettway does not protect Wilson from the

consequences of any misrepresentations that she made to Moore or Mays, because she made any such misrepresentations outside the context of any EEOC proceeding. The *Pettway* court expressly refused to "decide whether a writing purporting to be and to be used as a charge, which does not meet the requisites of a charge such as is required to set the EEOC machinery in operation is protected." *Id.* at 1007. Thus, *Pettway* only protects employees from retaliation for misrepresentations made in *certain* documents or statements *in EEOC proceedings*. *Pettway's* rationale entirely depends on EEOC's function in the administration of Title VII, so we cannot extend *Pettway's* holding to extra-EEOC proceedings without a reason for doing so.

We thus affirm the district court's judgment dismissing Wilson's Title VII claims.

B. SECTION 1983

1. First Amendment

[5,6] Wilson claims that the defendants deprived her of her constitutional right to free speech under color of law in contravention of 42 U.S.C. § 1983 by discharging her in retaliation for her speech about sexual harassment by UTHC police officers. This claim resemble Wilson's Title VII claim, but Title VII does not preempt a collateral section 1983 action based on the same incident. *Johnston v. Harris County Flood Control Dist.*, 869 F.2d 1565, 1573-76 (5th Cir. 1989), *cert. denied*, 493 U.S. 1019, 110 S.Ct. 718, 107 L.Ed.2d 738 (1990). The district court directed a verdict against Wilson on her First Amendment claim after ruling that her speech concerned a matter of insufficient public concern to merit constitutional protection.

"[W]hen a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters *only* of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior." *Connick v. Myers*, 461 U.S. 138, 147,

103 S.Ct. 1684, 1690, 75 L.Ed.2d 708 (1983) (emphasis added). Exercising *de novo* review, "we decide whether speech addresses a matter of public concern with reference to the 'content, form and context of a given statement, as revealed by the whole record.'" *Johnston*, 869 F.2d at 1577 (quoting *Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690).

The content of Wilson's speech--reports of sexual harassment perpetrated on her and other women at UTHC[4] --is of great public concern. *Cf. Connick*, 461 U.S. at 148, 103 S.Ct. at 1691 n. 8 (plaintiff's constitutional "right to protest racial discrimination [is] a matter inherently of public concern," citing *Givhan v. Western Line Consolidated School Dist.* 439 U.S. 410, 415-16, 99 S.Ct. 693, 696-97, 58 L.Ed.2d 619 (1979).

The defendants rely on *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986), *cert. denied*, 479 U.S. 1064, 107 S.Ct. 948, 93 L.Ed.2d 997 (1987) in arguing that Wilson's speech was not of public concern. The *Terrell* court held that the speech at issue was not of public concern in part because the speech consisted exclusively of criticisms of the competence of the speaker's supervisor. *Id.* at 1362; *see also Connick*, 461 U.S. at 147-48, 103 S.Ct. at 1690-91 (employee intra-office questionnaire was not speech of public concern inasmuch as questionnaire sought employee opinions on office's transfer policy). *Terrell* and *Connick* are thus distinguishable because the *only* reason that the public would be concerned about the speech there at issue was because it involved a public workplace. *See Terrell*, 792 F.2d at 1362 ("almost anything that occurs within a public agency *could* be of concern to the public"). This court before has cited *Terrell*

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[4] The defendants argue that the falsity of Wilson's charges forfeits any constitutional protection that they would otherwise enjoy. But, as we stated in our discussion of Wilson's Title VII claim, the evidence in this case conflicts on the veracity of Wilson's statements. Before the district court directed a verdict on Wilson's First Amendment claim under section 1983, a jury sat as the trier of fact for this claim. Thus, the district court's findings as to Wilson's Title VII claim do not apply to her section 1983 claim.

in identifying this critical distinction between speech concerning public official misconduct, and designated the latter of "public concern." *Brawner v. City of Richardson, Tex.*, 855 F.2d 187, 191-92 & nn. 10-14 (5th Cir. 1988).

[7] The defendants also argue that because Wilson acknowledged some duty as a police officer to report sexual harassment, she made the reports as an employee, not as a citizen. But practically, such a rule would permit public employers to remove constitutional protection from speech on certain subjects by including those subjects within employees' reporting duties. Any employer can require employees to report sexual harassment; because some forms of harassment are not criminal offenses, the reporting of harassment does not fall within the special province of police officers. Thus, the rule proposed by the defendants could ironically facilitate the suppression of speech through a requirement that the speech be made.

We return to *Connick* to determine the significance of an employee's duty to speak in the "public concern" determination. *Connick* "hold[s] only that when a public employee speaks *not* as a citizen upon matters of public concern, but *instead* as an employee upon matter only of personal interest," the First Amendment does not protect the employee from discipline for speaking. 461 U.S. at 147, 103 S.Ct. at 1690 (emphasis added). The words "not" and "instead" in this key statement can only mean that the Court removed from First Amendment protection only that speech that is made *only* as an employee, and left intact protection for speech that is made both as an employee and as a citizen.

We think that Wilson made her reports of sexual harassment both as a citizen and an employee. She contends that she started her reports after personally experiencing considerable harassment, and obviously had a stake as an individual citizen in having that conduct stopped, regardless of whether her reports also coincided with her job responsibilities.

[8] Nor did Wilson forfeit her right to speak by choosing an internal forum to speak as a citizen about sexual harassment within the UTHC police force. *See Givhan*, 439

U.S. at 415-16, 99 S.Ct. at 696-97; *see also Johnston*, 869 F.2d at 1577 (employee's testimony in a closed hearing convened to review intragovernment employment dispute is of public concern, and therefore protected speech). Having considered the jurisprudence and the parties' contentions, we conclude that the district court erred in holding that Wilson's speech was not of public concern.

[9,10] Though the speech of public employees may be of public concern, that speech still does not enjoy First Amendment protection if legitimate government interests in limiting the speech outweigh the employees' interest in speaking. *See Connick*, 461 U.S. at 150-51, 103 S.Ct. at 1691-92 (citing *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968)). The defendants invite us to affirm the district court's dismissal of Wilson's First Amendment claim on the ground that her interest in reporting sexual harassment is outweighed by UTHC's interest in eliminating dissension among its employees and in providing efficient police protection. We cannot accept this invitation because the defendants prematurely assume a finding that Wilson did not speak in good faith. If a jury determines that she reported sexual harassment in good faith, then UTHC's interest in maintaining a police force that is free of sexual intimidation, which Wilson's good faith reports would serve, outweighs any interest in departmental efficiency and harmony.

[11] Finally, the defendants argue that Wilson produced insufficient evidence that they retaliated against her for her speech, so we may affirm the district court's directed verdict on this ground. After reviewing the record, we agree as to defendants Davis and Hurst. Moore and Mays decided to discipline Wilson and Jackson reviewed that decision, so each could have retaliated against Wilson for her protected speech. And any retaliation for Wilson's speech on a matter of such prominent public concern as workplace sexual harassment represents a violation of a clearly established right, so under *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982), these defendants are not entitled to qualified immunity. On remand, a jury will

decide whether they in fact retaliated against Wilson for her protected speech.

2. Due Process

[12] The district court directed a verdict against Wilson on her due process claim under section 1983 after ruling that Wilson's own evidence showed that she received constitutionally sufficient process in each instance in which the defendants took disciplinary action against her. Wilson argues that she received insufficient pre-disciplinary process. But even when a government terminates an employee, the Constitution only requires notice and an opportunity to respond prior to termination. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 106 S.Ct. 1487, 1495, 84 L.Ed.2d 494 (1985). The record establishes that Wilson got this much process in each instance in which the defendants disciplined her. We thus affirm the district court's judgment as to Wilson's due process claim under section 1983.

C. DEFAMATION

[13] Wilson claims that the court erred in directing a verdict against her on her defamation claims against Mays and Moore under Texas law. The court held that Wilson could not prevail because she adduced insufficient evidence of malice. *See Ramos v. Henry C. Beck Co.,* 711 S.W.2d 331, 335 (Tex.App.--Dallas 1986, no writ)(privilege for employer's accusations against employee, made to person with common interest in employee's discharge, lost if plaintiff carries burden of proving that communication made with malice). In considering a motion for a directed verdict in a jury trial, the court must "consider all the evidence ... in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting the motion[] is proper." *Boeing Co. v. Shipman,* 411 F.2d 365, 374 (5th Cir.1969)(en banc). We apply this same standard in reviewing the district court's decision. *Id.* at 377.

Applying the *Boeing* standard, we think that Wilson presented sufficient evidence of malice to survive summary judgment. Mays and Moore portrayed Wilson as a forger and a liar in her letter of termination. Wilson testified that neither of these were true and asked the jury to infer that Moore and Mays said these things to justify terminating her when they really wanted to discharge her for reporting sexual harassment. Based on the evidence presented, the jury was entitled to accept this version of events and find that Moore and Mays acted with malice.

[14] The defendants claim that, under *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 101-02, 104 S.Ct. 900, 908-909, 79 L.Ed.2d 67 (1984), the Eleventh Amendment precludes the district court from exercising jurisdiction over Wilson's state-law defamation claim against state officials. But the district court dismissed all claims against UTHC and the defendants in their official capacities before directing a verdict on the defamation claim as to Moore and Mays in their individual capacities. *Pennhurst* and the Eleventh Amendment do not deprive federal courts of jurisdiction over state law claims against state officials strictly in their individual capacities. *Voisin's Oyster House, Inc. v. Guidry*, 799 F.2d 183, 187-88 (5th Cir. 1986). Thus, the district court properly exercised jurisdiction over Wilson's defamation claims against Mays and Moore.

III. CONCLUSION

We REVERSE the district court's judgment insofar as it dismisses Wilson's First Amendment claims under section 1983 against Jackson, Mays, and Moore, and insofar as it dismisses Wilson's defamation claims against Mays and Moore. We AFFIRM the court's judgment in all other respects. We REMAND this case for further consideration.

Supreme Court, U.S.
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No. 92-1156

In The

Supreme Court of the United States

October Term, 1992

GEORGE HURST, RON MAYS, HENRY JACKSON
JOHN MOORE, CHESTER DAVIS,

Petitioners,

vs.

MARILYN WILSON,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent does not believe that this case presents either of the Questions set forth in Petitioners' Application for Writ of Certiorari and that those questions cannot be decided on this record.

Respondent restates the questions presented as follows:

1. The Question Of Whether The First Amendment Protects Informal Complaints Of Sexual Harassment Is Not Presented By The Opinion Below Or By The Record.

2. The Decision That The Speech In Question Is Protected Does Not Conflict With An Opinion From This Court Or From Any Other Circuit.

PARTIES TO THE PROCEEDING

1. George Hurst, Ron Mays, Henry Jackson, John Moore, Chester Davis, Petitioners.

2. The University of Texas Health Center at Tyler was a Defendant below for purposes of Respondent Wilson's Title VII claim, which was dismissed.

3. Marilynn Wilson, Respondent.

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STATEMENT

Petitioners have overstated the facts in its favor. The Court of Appeals as well as this Court must view the facts in the light most favorable to the non-moving party in reviewing the propriety of granting a motion for directed verdict. See *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). Petitioners have stated the facts in a light most favorable to the movant rather than the non-movant.

The allegations of sexual harassment made by Wilson were made in a formal charge of discrimination. (R. III-12, 13) Before Wilson brought the complaints to the Police Chief she contacted the Director of Human Resources who advised her to first inform the Police Chief before filing formal charges. (R. II-23, 29)

Wilson complained that a campus police officer, Chester Davis, sexually harassed her and three other women employees of the University. (R. III-12) Davis admitted asking several young women employees to go to the woods with him and was disciplined following an investigation. (R. III-146, PX-18)

Wilson, after reporting her complaints, was reprimanded by the Chief of Police, purportedly for her delay in reporting the incident. In the letter of reprimand the Chief of Police stated:

> "You cannot unclothe yourself of duty at your convenience. In this matter, you undressed yourself of responsibility both mentally and administratively by alleging intimidation and by waiting twenty-eight days before taking any action and/or reporting the incident to me."

Thereafter, acting on the Chief's request to report even rumors of misconduct, Wilson submitted a report of what she believed to be unwelcomed comments by another officer to a young woman. (R. II-36, 37) The young woman apparently welcomed the comments, so the Police Chief suspended Wilson for ten days for allegedly filing a false report and demoted her from Sergeant to Police Officer. During the appeal of the demotion Wilson was terminated after being accused of forging a document.

The opinion of the Court of Appeals accurately summarizes the evidence except for failing to note that Wilson filed formal charges of discrimination and that Plaintiff raised her complaints with the Police Chief at the request of the personnel director.

Respondent filed suit against Petitioners, alleging both discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964, discharge for having exercised her First Amendment right to report sexual harassment, and defamation because she had been falsely accused of being a forger and a liar. The Title VII claims were tried to the bench, and the First Amendment and defamation claims to a jury. The district court ruled against Respondent on her Title VII claims, and directed a verdict in favor of Petitioners on the First Amendment and defamation claims.

On appeal, Respondent argued there was enough evidence of retaliation for the reports of sexual harassment to take the case to the jury. Petitioners disputed that contention, but also argued that, even if there was enough evidence of retaliatory motive to reach the jury, the directed verdict could be affirmed on the alternate ground that those reports didn't qualify as "of public concern" under *Connick v. Myers*, 461 U.S. 138 (1983). This argument was not based on a broad contention that reports of sexual harassment are not matters of public concern; rather, Petitioners relied solely on a Fifth Circuit case that had distinguished between reports made in one's capacity as a citizen. *Terrell v. University of Texas System Police*, 792 F.2d 1360 (5th Cir. 1986). According to Petitioners, *Terrell* drew a bright line between these two

capacities; Petitioners contended that because Respondent had a duty as a police officer to report these infractions, her reports were necessarily made solely in her capacity as an employee. Petitioners also argued for immunity from damages, essentially on ground that, because Petitioners were allegedly right on their *Connick* argument, they were necessarily qualifiedly immune.

The Court of Appeals determined that there was enough evidence of defamation and of retaliatory motive to send the First Amendment and defamation claims to the jury. It also rejected both alternate grounds for affirmance of the directed verdict on the First Amendment. First, the court held, the fact that speech may be made, in part, in one's capacity as an employee does not prevent it from also pertaining to matters of public concern, thus implicating the First Amendment. Moreover, the court held that workplace sexual harassment is the focus of such prominent public concern that retaliation for reporting it would violate a clearly established right. Accordingly, the court remanded to permit a jury to decide whether Respondent suffered such retaliation.

REASONS FOR DENYING THE WRIT

There Is No Disagreement Among The Lower Courts On Either Of The Questions On Which Review Is Sought, And The Second Question Was Not Argued Below.

1. The first question on which Petitioners seek review is whether, when Respondent was fired (in 1987, although the Question says 1986), it was clear that workplace sexual harassment was a matter of great public

concern such that an employee's report of such harassment was protected by the First Amendment. Petitioner does not identify a single decision by any lower court that reached a different result from the holding below on the issue of immunity. Instead, in order to try to manufacture a split among the circuits, Petitioner argues that immunity must always be discussed at great length, as the Tenth Circuit did in the case they found; the Fifth Circuit's discussion, being too short, raises a conflict on how long such discussions ought to be.

Not only is this a preposterous position, but it is flatly contradicted by Petitioner's own arguments in the court of appeals. In their brief, Respondents spent only three paragraphs, barely more than a full page of text, 22-23, asserting their immunity against the First Amendment claims. In that argument, they said little more than that, because the law was still clear that speech made as an employee, rather than as a citizen, and in the course of making police reports, as that is never protected by the First Amendment, *a fortiori* Petitioners had qualified immunity. They also argued that, because *Pickering v. Bd. of Education*, 391 U.S. 563 (1968), balancing must be performed on a case by case basis, a public official cannot be held liable in damages for balancing incorrectly. Not only is that not the law, but it isn't the basis for qualified immunity that Petitioners now advance in this Court through their question presented. Thus, this question also does not merit review.

In any event, *Givham v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979) and *Connick v. Myers*, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983) made clear, long before

the discharge here, that Respondent's rights were protected.

2. The second question on which review is sought is whether reports of sexual harassment are *per se* matters of public concern. Petitioners did not present that issue below. Their only argument in that regard was that Respondent had made reports that, as a law enforcement officer, she had a duty to make; Petitioners then argued that the Fifth Circuit's decision in *Terrell* was controlling. Although the Fifth Circuit rejected Petitioners' *Terrell* argument (correctly, in our view), that is not the question on which they ask this Court to grant review.

Nor is there any division among the lower courts on the question that Petitioners do present. In *Callaway v. Haferman*, 883 F.2d 842 (7th Cir. 1989), the court did not say that sexual harassment reports cannot be protected, and did not even address the question of whether they are usually protected. The court simply held that, in the unusual circumstance where the Respondent not only made the report only about herself, and made it privately, but also went to great lengths to avoid the issue becoming public, wanting to keep it personal and private, the court could not say that the case involved the sort of "matter of public concern" that is protected under *Connick*.

The Decision Below Accords With The Opinions Of The Courts Of Appeal And There Are No Broad Conflicts Among The Lower Courts Requiring Resolution By This Court.

Petitioners, based upon their version of the record, assert that the decision of the Court of Appeals is in

conflict with *Callaway v. Haferman*, 883 F.2d 842 (7th Cir. 1989), thus generating a conflict among the Circuits.

The decisions are not in conflict. The Court in *Callaway* did not reach the broad question which Petitioner asserts in the Petition. In *Callaway, supra* the Seventh Circuit was faced with the question of whether informal oral communication of alleged sexual harassment is protected. Callaway did not want to make a public issue of the allegations.

Wilson, on the other hand, first reported her complaints of sexual harassment to the personnel director who was charged with the responsibility of receiving such complaints under the University's policy prohibiting sexual harassment. At the direction of the personnel director, Wilson reported to the Police Chief the sexual harassment of herself and three other women employees. She then filed formal charges of sexual discrimination with the University and after her discharge filed charges with the Equal Employment Opportunity Commission.

The *Wilson* holding, then, can be distinguished from *Callaway* on the facts. Wilson's speech involved matters of both personal and public concern. The speech was encouraged by and supposedly protected by both the internal policy prohibiting retaliation and by Title VII's proscription of reprisals. Wilson complained not only of her own sexual harassment but also of the harassment of other women by the same actor. Respondent, by filing formal internal charges of discrimination and by complaining about the sexual harassment of other women on the campus, engaged in speech on a matter inherently of

public concern. The Court of Appeals below, then, correctly concluded, based upon the content, form and context, that the speech was protected. Whether the speech involves a matter of public concern must be determined by the content, form and context of a given statement, as revealed by the whole record. *Connick v. Myers*, 461 U.S. 138, 147-148, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). See also, *Givham v. Western Line Consolidated School District*, 439 U.S. 410, 99 S.Ct. 693, 58 L.Ed.2d 619 (1979). This inquiry is necessarily *ad hoc* and fact-intensive. Therefore, based upon the facts herein, the decision of the court below is not in conflict with prior precedent. *Wulf v. City of Wichita*, 883 F.2d 8412 (10th Cir. 1989) in Respondent's view correctly states the law.

CONCLUSION

Therefore Respondent prays for the reasons stated that the Petition for Writ of Certiorari, be DENIED.

Respectfully submitted,

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